United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

75-7388

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ACHA, et al.,

Plaintiffs--Appellants,

v.

BEAME, et al.,

Defendants--Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

ABNER W. SIBAL
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

BEATRICE ROSENBERG
CHARLES L. REISCHEL
LUTZ ALEXANDER PRAGER
Attorneys

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 E Street, N. W.
Washington, D. C. 20506

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ISSUE PRESENTED

Whether the district court improperly dismissed an action in which the complaint alleged that female police officers had been unlawfully discriminated against in hiring, solely because of their sex; that the New York Police Department's refusal to credit them with the seniority which they would have earned but for the hiring discrimination, perpetuated such discrimination; and that--but for the refusal to grant such seniority credit--they would have had enough seniority to withstand the Department's reduction-in-force.

STATEMENT OF THE CASE

This is an appeal from the dismissal of an action brought under Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (1970, Supp. II);[1] the Civil Rights Act of 1871, 42 U.S.C. 1983;[2] and the Fourteenth Amendment.

1/ Title VII reads in relevant part:

> Sec. 703(a)[42 U.S.C. 2000e-2(a)]. It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's. . .sex. . .; or
>
> (2) to limit, segregate, or classify his employees. . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's. . . sex. . . .

Public employers have been subject to Title VII since March 24, 1972.

2/ 42 U.S.C. 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

[footnote continued]

Plaintiffs are two female police officers who were threatened with layoff from the New York Police Department as a result of a major reduction in the strength of the police department. They seek to represent a class of approximately 500 other female police officers also threatened with layoff. Defendants are the Mayor and Police Commissioner of New York City, as well as the city itself.

The complaint was filed June 25, 1975, shortly before the layoffs were to become effective, and was accompanied by several affidavits and exhibits. (App. 16a-58a). Defendants filed two affidavits in opposition (App. 59a-66a), and on June 30 the district court held a hearing on plaintiffs' requests for preliminary injunctive relief restraining the layoff of members of the plaintiff class. (App. 67a-95a). No evidence was intro-

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2/ [footnote continued]

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

duced at the hearing but at the urging of the trial judge the parties were able to stipulate to some of the more important relevant facts.

From the complaint, the affidavits, and the stipulations, the following picture emerges:

Until February, 1973, the New York Police Department had an upper limit on the number of police-women it would hire; as of December 28, 1972, that limit was 355 out of a total complement of 26,414 officers (App. 84a-85a)--or approximately 1.34%.

Because of the stringent limitation on the number of police-women in the department, between 1964 and 1969 the city gave only two examinations for the position of policewoman. (App. 78a). During the same period the city conducted a much larger number of examinations for patrolman, the male equivalent to the policewoman title. (App. 79a). Not only were women not tested between 1964 and 1969, but--even though the tests for males and females were identical in content (App. 80a)--

men with lower scores were hired in preference to women with higher scores. (App. 9a; 85a).

The two named plaintiffs (both born in 1941) (App. 32a; 36a) allege that they and a large number of their class were eligible to take the patrolman's examination after 1964 and prior to 1969 but were prevented from being examined and hired, solely because they are female. (App. 43a; 46a). Even though the two named plaintiffs and other women took the examination in 1969, no women were hired into the police department between 1969 and 1973. On the other hand, according to the plaintiffs, men were hired as police officer trainees during that period and given permanent assignments as patrolmen upon reaching the age of 21. (App. 85a).

In 1973, the Police Department replaced the titles "patrolman" and "policewoman" with the asexual title of "police officer." (App. 78a). Also in 1973, a single entry test was given to both male and female applicants and a unitary eligibility list established.

Positions on the list were determined by test results, without distinction as to sex. (App. 79a-80a).

The June 1975 layoffs which precipitated this suit eliminated somewhat over 6500 police officers, constituting approximately 25% of the Department's non-civilian personnel. (App. 60a; 82a). In accordance with the requirements of Section 80 of the New York Civil Service Law,[3/] the 6500 officers chosen for layoff were those who had most recently been hired and therefore had the least seniority. (App. 61a; 73a). In order to meet the layoff goal, all officers hired after March 1969 were laid off. (App. 61a). Because women were hired in significant numbers only after 1969, the layoffs

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3/ Section 80 reads in relevant part:

> 1. Suspension or demotion. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs. . . .

affected a much larger proportion of female officers than male officers. Seventy-three per cent of the female police officers--500 altogether--were laid off (App. 83a), while only 26% of the male officers were laid off. (App. 95a; 98a). As a consequence of the layoffs, after June 30 less than 1% of the remaining police officers were female.

At the June 30 hearing, the lower court summarized plaintiffs' position:

> Your position is that women were discriminated against in the hiring for the police force for the period prior to 1973. Because of that discrimination they ended up with the least seniority. . . . Section 80 of the Civil Service Law [requires that] they are [to be] the first to go and in fact it works a double discrimination against them.
>
> One, they were unable to obtain the jobs at the beginning and, two, that they are the first to go, right?
>
> MR. SCHEHTMAN: Precisely.
>
> THE COURT: Nice tight argument.

App. 87a.

The day after the hearing, the lower court rendered its opinion. Relying on Jersey Central Power Co. v. Local Union 327, IBEW, 508 F.2d 687 (3rd Cir. 1975), and Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), the court discerned an "underlying principle" permitting the layoffs of the female officers. (App. 98a-99a). The lower court also stated that "[t]o issue the order sought by the plaintiffs in this case would be directly contrary" to §703(j) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j).[4/] The court thereupon denied all injunctive relief and, sua sponte, declared it would dismiss the action. (App. 99a). Judgment dismissing the action was formally entered on September 2, 1975.

4/ Section 703(j) reads in relevant part:

> Nothing contained in this title shall be interpreted to require any employer. . . subject to this title to grant preferential treatment to any individual or to any group because of the. . . sex. . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any. . sex. . . employed by any employer. . .in comparison with the total number or percentage of persons of such. . .sex. . .in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

ARGUMENT

DISMISSAL OF THIS ACTION WAS COMPLETELY UNWARRANTED; IF PLAINTIFFS' EVIDENCE SUPPORTS THEIR ALLEGATIONS THEY ARE ENTITLED TO RELIEF.

1. Introduction.

The lower court dismissed this action without waiting for defendants to present a motion. As a result, the procedural basis on which the court acted is obscure, and its opinion unenlightening. No answer had been filed; none of plaintiffs' material contentions had been disputed by defendants' two affidavits; no attack had been made on the court's jurisdiction. It may nevertheless be that the court determined that the complaint failed to state a cause of action and should be dismissed under Rule 12(b)(6). In so deciding the lower court failed to consider the standard by which complaints are to be judged:

> The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. . . Moreover, it is well established that, in passing on a motion, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote ommitted)".

Scheuer v. Rhodes, 416 U.S. 232 (1974). Accord: Holmes v. New York City Housing Authority, 398 F.2d 262, 264-65 (2d Cir. 1968) (§1983 suit).

Rather than determine, then, whether the police-women will ultimately win, this Court need decide only if there is any theory under which they can prevail, given the facts which appear in the complaint--as revised by subsequent stipulations, affidavits, and exhibits.

In the remainder of this brief we outline what we believe to be the legal theory--in light of the facts established or alleged--which best supports plaintiffs' claim that they should not have been

laid off.[5] We contend that when any female officer can show that, but for the police department's discriminatory refusal to hire her earlier than her date of actual employment, she would have had sufficient seniority to withstand a layoff, the department violates §1983 and Title VII if it does not credit her with seniority for the period she was discriminatorily denied employment. In crediting seniority the department must not only consider the date on which the female officer actually applied, but also the period she was deterred or prohibited from applying because of the department's discriminatory hiring practices, caused by its severe limitation on the number of women in the department. Far from constituting preferential treatment, as the lower court mistakenly assumed, the crediting of seniority for the period during which the female

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5/ Our discussion is not meant to foreclose the likelihood that other theories will also support the complaint. We believe, however, that the position we here present will authorize the trial court to give plaintiffs full relief.

police officer was discriminatorily denied employment simply places her in her rightful place on the seniority escalator. Necessarily, therefore, layoffs or recalls which occur as a result of the failure to credit female police officers with the seniority necessary to attain their rightful place perpetuate the earlier hiring discrimination and are thus unlawful under both §1983 and Title VII.[6/]

We add one cautionary comment. This Court is being called upon to decide a pleading problem, not to determine relief. Who, if anyone, is to be laid off or recalled are matters to be decided by the trial court at a later state of these proceedings. At that time the district court will be expected to use its equitable powers not merely to provide full relief to the successful plaintiffs but also to do so with the least possible disruption to the Police

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6/ Our position parallels that which we (together with the Solicitor General) have advanced in our brief to the Supreme Court in Franks v. Bowman Transportation Co., cert. granted, No. 74-728, March 24, 1975, as amplified by Note, Last Hired, First Fired Layoffs and Title VII, 88 Harv. L. Rev. 1544 (1975).

Department and the least harm to those who have been the beneficiaries of the discrimination but who are not themselves responsible for the discriminatory practices.

2. The Police Department Violates §1983 and Title VII by Basing Layoff Decisions on Seniority Without Accounting for the Seniority which the Female Police Officers Would Have Earned but for the Department's Discriminatory Refusal to Hire Them Earlier.

The lower court assumed that because a public employer has a bona fide seniority system it does not violate §1983 or Title VII in making layoffs and recalls on the basis of seniority even when it fails to give its female officers credit for the period they were discriminatorily excluded from employment. While the court seemed to have understood the thrust of plaintiffs' contentions (App. 87a; supra at 7), it apparently misunderstood their significance. This case does not involve an attack on the seniority system itself; rather, it involves an attempt to fit female officers into their right-

ful place in a system assumed to be lawful. The lower court thus erred in failing to recognize that a presumptively lawful seniority system does not protect an employer from making unlawful employment decisions based on the improper positioning of individual victims of past discrimination within that system.

From the facts alleged and conceded it is clear that until 1973 an indeterminate number--perhaps most--of the female officers were themselves excluded from the police department solely on account of their sex. They were either prevented from taking the entrance examination between 1964 and 1969 or, if they passed the 1969 examination, were refused appointment as police officers, whereas men with lower scores were appointed. If they passed the 1969 examination they were nevertheless excluded from the department until 1973; men, however, were trained and hired during the same period. Thus

the department discriminatorily and unlawfully[7/] prevented these women from earning the seniority which would have been theirs had they been men.

While seniority based solely on length of employment which is equally obtainable by men and women is a proper factor on which to base employment decisions, it becomes unlawful if women applied and were discriminatorily refused employment at the same time that men were hired and began earning seniority. Under such circumstances the use of seniority to determine who is to be laid off unlawfully perpetuates the employer's earlier discrimination.

Courts have long recognized that practices which perpetuate past discrimination themselves violate §1983 and Title VII. As the Supreme Court has said:

7/ Refusal by a public employer to hire women solely because they are women is presumptively unlawful under the Fourteenth Amendment and §1983, whether one applies the "substantial relationship" or "strict scrutiny" standard. Compare

[footnote continued]

> Under [Title VII] practices, procedures, or tests neutral on their face, and even neutral in terms of intent cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). This Title VII standard has been extended to §1983 suits. It has specifically been applied to the use of seniority in instances where blacks and women had been discriminatorily refused the opportunity to acquire the necessary seniority to compete with white males. Thus, in Afro-American Patrolman's League v. Duck, 503 F.2d 294, 301 (6th Cir. 1974), the court found that a police promotion system based on seniority violated §1983 by perpetuating past hiring discrimination where blacks had previously been excluded from the police department. Similarly, in Schaefer v. Tannian, 394 F.Supp. 1136, 1147 (E.D. Mich. 1975), a case which, like the present one, involved the layoff of female police officers, the court found that the layoffs unlawfully perpetuated past discrimination in hiring

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7/ [footnote continued]
Reed v. Reed, 404 U.S. 71 (1971), with Fronteiro v. Richardson, 411 U.S. 677 (1973). The defendants have filed no answer and have not attempted to justify their pre-1973 discriminatory hiring practices; in the light
[footnote continued]

resulting from restrictions on the number of women which the department would employ. Cf. Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1972), affirming Harper v. Mayor, 359 F.Supp. 1187, 1203-1204 (D. Md. 1974).

This Court has also recognized that employment practices which perpetuate past discrimination are themselves unlawful. In United States v. Bethlehem Steel Corp., 446 F.2d 652, 659 (2d Cir. 1971), this Court said:

> The pervasiveness and longevity of the overt discriminatory hiring and job assignment practices, admitted by Bethlehem and the unions, compel the conclusion that the present seniority and transfer provisions were based on past discriminatory classifications. . . . Accordingly, Chief Judge Henderson's conclusions that the continued use of the seniority and transfer provisions perpetuated discrimination and therefore violated the Act were surely correct.

(Citations omitted). See also Gresham v. Chambers, 501 F.2d 687 (2d Cir. 1974)(dictum); United States

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7/ [footnote continued]
of the Police Department's ability to drop its restrictions on the employment of women after 1973 without apparent harm it is doubtful that they could justify the exclusion of women. Clearly, however, this question should not be resolved at the pleading stage of this litigation.

v. Local 638, Enterprise Assoc. of Steamfitters, 360 F.Supp. 979 (S.D. N.Y. 1973), appealed and aff'd on other grounds, sub nom., Rios v. Enterprise Assoc. of Steamfitters, 501 F.2d 622, 628 (2d Cir. 1974). The doctrine that present practices which perpetuate past discrimination are themselves unlawful has also been accepted by every other appellate court faced with the issue.[8/]

8/ For employer practices, see United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582, 587 (4th Cir. 1972), cert. denied, 411 U.S. 939 (1973); Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 56 (5th Cir. 1974); Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973); Rogers v. International Paper Co., 510 F.2d 1340, 1346-1347 (8th Cir. 1975); Jones v. Lee Way Motor Freight Co., 431 F.2d 245, 248 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971); Quarles v. Philip Morris Co., 279 F.Supp. 505, 518 (E.D. Va. 1968). For union practices, see Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1054-1055 (5th Cir. 1969); United States v. IBEW Local 38, 428 F.2d 144, 150 (6th Cir. 1970); United States v. Operating Engineers, Local 520, 476 F.2d 1201, 1204 (7th Cir. 1973); United States v. Sheet Metal Workers Int'l Ass'n, Local 36, 416 F.2d 123, 129-132 (8th Cir. 1969); United States v. Ironworkers, Local 86, 315 F.Supp. 1202 (W.D. Wash., 1970), aff'd, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971).

In order to cure this past discrimination--in order, in other words, to avoid the permanent subordination of the identifiable female victims of the police department's earlier hiring practices--the police department was obligated to credit its female officers with the seniority they lost as a result of its discriminatory practices. The crediting of such seniority places both the female victims and the male beneficiaries of the earlier discrimination in their proper places within the system. As the Court of Appeals for the Third Circuit noted, the importance of seniority in determining both layoffs and advancement requires that seniority be credited for the time lost as a result of discrimination: "[o]nly in this way will the present affects of the past discrimination be eliminated." Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3rd Cir. 1973), vacated and remanded on other grounds, 414 U.S. 970 (1973). Cf. Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975); but cf. Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974), cert. granted, No. 74-728, March 24, 1975. The crediting of seniority dis-

criminatorily withheld is also accepted practice under the National Labor-Management Relations Act. Employers are expected by the National Labor Relations Board "to credit all employees with such seniority and other rights and privileges that would have accrued to them as of the dates they would have been hired, absent the discrimination against them". Atlantic Maintenance Co., 134 NLRB 1328, 1330 (1961), enforced, 305 F.2d 604 (3rd Cir. 1962); see also Consolidated Dairy Products, 194 NLRB 701, (1971); Southern Electrical & Pipefitting Corp., 131 NLRB 44 (1961); Lamar Creamery Co., 115 NLRB 1113 (1956), enforced, 246 F.2d 8 (5th Cir. 1957).

The seniority with which the female officers should have been credited is not wholly determined by the date of their initial application. Because the Department failed to provide women the opportunity to take entrance examinations between 1964 and 1969, application was either impossible or futile.[9/] Con-

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9/ As in other areas of the law, courts have held that persons asserting rights under the civil rights laws need not have engaged in futile acts nor should

[footnote continued]

sequently, the female officers should have been credited with the seniority they would have earned, had the department hired women in the same manner as it hired men, irrespective of the date of actual application. While the precise date chosen may pose evidentiary problems, that does not justify a failure to make reasonable adjustments.[10/] In any event, the actual seniority to be credited to individual members of the class is a matter to be determined by the trial court on the evidence, not one appropriate for determination on appeal from dismissal of a complaint for failure to state a cause of action.

9/ [footnote continued]

they be penalized because they declined to participate in a charade. Lea v. Cone Mills, 301 F.Supp. 97, 102 (M.D. N.C. 1969), affd., 438 F.2d 86 (4th Cir. 1971); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); United States v. Sheetmetal Workers, Local 36, 416 F.2d 123, 132 (8th Cir. 1969); United States v. Local 86, Ironworkers, 315 F.Supp. 1202, 1204 (W.D. Wash. 1970), affd, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971). See also Cypress v. Newport News General & Nonsectarian Hospital Assoc., 375 F.2d 648, 653 (4th Cir. 1967)(en banc). But see Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974).

10/ See Meadows v. Ford Motor Co., 510 F.2d 939, 946-47 (6th Cir. 1975)(calculation of back pay and seniority); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 258-64 (5th Cir. 1974) (calculation of back pay).

3. Neither Statute nor Case Law Validates the Police Department's Refusal to Credit Each Female Officer with Seniority for the Period She Was Discriminatorily Excluded from the Department.

The lower court, after having first properly understood plaintiffs' argument, nevertheless concluded that plaintiffs sought "preferential" treatment. The court found such preferential treatment to be barred by §703(j) of Title VII. In addition, despite its initial understanding that all that plaintiffs wanted was their rightful place within the seniority system (App. 87a), the court concluded that §80 of the New York Civil Service Law was not unlawful and that the system was therefore valid. We argue below that the lower court erred in believing that plaintiffs were asking the Police Department to treat them preferentially and that the court's discussion as to the validity of §80 is utterly irrelevant since the validity of §80 is not at issue in the present action.

a. "Preference" Is Not Involved in this Suit.

This is a suit demanding an adjustment of seniority. Plaintiffs seek parity, no preference. While the women officers may be being treated on an equal basis with men hired contemporaneously, the relevant comparison is with male officers who were hired at the time each of the female officers was discriminatorily denied employment because of the department's refusal to hire women. It is the continued disadvantage which the plaintiffs suffer as a consequence of the Police Department's earlier discrimination which denies them the opportunity to compete with men who were hired in their stead. Thus, the female officers only seek the opportunity to obtain the same seniority they would have had, had they been men. Thier claim is therefore an effort by the female

officers to reduce the preferential advantage which male officers received at their expense, not an effort to obtain preferences for themselves. Cf. Patterson v. Newspaper & Mail Deliverers Union, 514 F.2d 767 (2d Cir. 1975).[11/] Consequently, §703(j) is wholly inapplicable.[12/] See Jones v. Lee Way Motor

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11/ In Patterson this Court affirmed court approval of a settlement which granted minority union members previously unavailable promotional opportunities. This aspect of the agreement, this Court said,

> . . . merely compensates for past discrimination by allowing a reasonable number of minority persons to be promoted to the "rightful place" on the seniority ladder, which they would have occupied but for industry-wide racial discrimination.

514 F.2d at 775; emphasis supplied.

12/ Section 703(j) has no bearing, of course, on the §1983 claim. See Rios v. Enterprise Association of Steamfitters, Local 638, 501 F.2d 622, 638 (2d Cir. 1974)(Hays, J., dissenting). Cf. Johnson v. Railway Express Agency, 421 U.S. 454, 44 L.Ed. 2d 295, 95 S.Ct. 1716 (1975)(relationship between Title VII and 42 U.S.C. 1981); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 172 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971) (relationship between Title VII and Executive Order 11246).

Freight, Inc., supra, 431 F.2d at 250.

b. This Action Does Not Involve a Challenge to the Layoff System; the Decisions on which the Lower Court Relied Are therefore Inapposite. The lower court, in effect, concluded that the Police Department can make any employment decision adversely affecting its female officers so long as it does so pursuant to a seniority system which is itself bona fide. The court therefore believed it could ignore the position of the female officer within the seniority system, even when her relatively low position in that system is directly attributable to the department's discriminatory hiring practices. The court relied for its conclusions on two recent decisions involving challenges to seniority systems; those decisions, in turn, were based on interpretations of §703(h) of Title VII, 42 U.S.C. 2000e-2(h).[13/]

13/ §703(h) reads in relevant part:

> . . .it shall not be an unlawful employment practice for an employer to apply different terms conditions, or privileges of employment pursuant to

[footnote continued]

Section 703(h), we submit, is not applicable to the claim in this action. First, this is a §1983 suit. Nothing in Title VII or in its legislative history makes any part of Title VII applicable to or a limitation on §1983.[14/] Second, §703(h), on its face, protects bona fide systems, it does not address the issue of where a particular individual fits within a system which is presumptively bona fide. In our view, nothing in §703(h) legitimizes employment decisions based on a seniority system unless the victims of earlier hiring discrimination are first placed in their proper places within that system.

13/ [footnote continued]

> a bona fide seniority or merit system. . . provided that such differences are not the result of an intention to discriminate because of. . . sex. . . .

14/ See note 12, supra, at 24.

Furthermore, where the differences in the terms, conditions, and privileges of employment are based on a factor--seniority--which the employer by its prior discrimination has withheld from female employees, those differences are "the result of an intention to discriminate because of. . . sex" and are specifically excluded from protection. The differences between the seniority to which the women here would have been entitled in the absence of the Police Department's unlawful conduct and the seniority on which the department's layoff decisions were made are differences which result directly from discrimination on the basis of sex. Therefore, whatever protections §703(h) provides to the Police Department's seniority system, it in no way protects the department in making layoff decisions on the basis of the discriminatory seniority dates assigned to each woman officer.

Although the language of §703(h) clearly has no application to the claims presented by the plaintiffs here, the Police Department may argue that Congress nevertheless intended to permit the use of seniority lists which cluster victims of earlier hiring discrimination at the bottom as a direct result of that discrimination. While much has been made of the memoranda introduced during the 1964 debate on Title VII,[15/] there is nothing in the "legislative history" which suggests that §703(h) was intended to authorize the withholding of seniority credit from persons who were discriminatorily denied employment after such discrimination became unlawful. The whole thrust of the memoranda dealing

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15/ The relevant memoranda are set out and discussed in Note, Last Hired, First Fired, 88 Harv. L. Rev. 1544, esp. at 1549-50 (1975), and in 43 Geo. Wash. L. Rev. 947, 949-950, nn. 16-18 (1975).

with seniority--all of which were written months before §703(h) was introduced--is that the Act would have no retroactive effect on seniority rights which had accrued prior to July 1965 when sex and race discrimination by private employers was assumed to have been lawful. The memoranda reflect an intention to free private employers from the obligation to give seniority credit for discrimination which occurred prior to passage of the Act. There is no indication, however, that any Senator believed that post-1965 unlawful hiring discrimination could forever be perpetuated by the withholding of seniority credit for the period of the unlawful exclusion. Unlike private employers, discrimination by public employers has been unlawful since adoption of the Fourteenth Amendment and §1983 over a century ago.[16/] While the

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16/ See note 7, infra, at 15. We do not concede that the merits of plaintiffs' claims depend on a determination that the Police Department's hiring practices were unlawful. We think it sufficient that they were discriminatory. This Court has held that seniority lists which perpetuate past discrimination must be revised even if rankings on that list are the result of pre-1965 lawful discrimination. United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

[footnote continued]

memoranda make no reference to public employers, it is a fair inference that Congress no more intended §703(h) to permit the perpetuation of unlawful past discrimination by public employers than it intended to permit the perpetuation of unlawful discrimination by private employers. On the contrary, it is unreasonable to assume that Congress intended persons who have themselves been unlawfully denied employment indefinitely to bear the brunt of that unlawful discrimination with respect to the most important aspect of employment opportunity, the opportunity to have a job. Hence, neither §703(h) nor Congressional "intent" justifies the withholding of seniority credit by the Police Department here.

Like §703(h), the two decisions on which the court below relied focused solely on an issue not framed here, the lawfulness of the seniority system itself; neither therefore is relevant to plaintiffs' claims in the present suit. Jersey Central Power & Light Co. v. Local 327, IBEW, supra, 508 F.2d at 687, involved an attack on a seniority system,

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16/ [footnote continued]
Our sole point here is that the 1964 Senate memoranda do not in any event provide justification for a blanket exemption of seniority lists from Title VII coverage.

primarily on the ground that the system disadvantaged blacks and other minorities because it operated to lay off a disproportionate number of members of those groups. The theory on which Jersey Central was argued and decided involved the group phenomenon. The placement within the system of identifiable individuals was not at issue; there was no evidence that any person who was being laid off had previously been denied employment; no party to the appeal argued that they had been; and the court did not address the question.[17/] Waters v. Wisconsin Steel Works, supra, 502 F.2d at 1309 was decided after trial, not at the pleading stage. The Waters court felt itself obliged to determine

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17/ While the language is obscure, the Jersey Central court may have left the question open: ". . . we need not, and indeed could not, decide whether any different result would obtain in an action brought by an aggrieved party were the requisite burden of proof sustained." Jersey Central Power & Light Co. v. Local 327, I.B.E.W., supra, 508 F.2d at 710.

> . . . (4) whether the trial court erred in concluding that Wisconsin Steel's "last hired, first fired" seniority system is violative of 42 U.S.C. §1981 and is not a bona fide seniority system under Title VII. . . .

502 F.2d at 1309. In analyzing Wisconsin Steel's system the court observed that

> Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination.

502 F.2d at 1320. The court concluded--somewhat tentatively--that Wisconsin Steel's seniority system "does not perpetuate the discrimination of the past." It seems doubtful that the Waters plaintiffs were seeking their rightful place within the seniority system; in any event the Waters opinion does not discuss, much less resolve, that issue. Thus, no statute and no decisional law[18/] requires dismissal of the present action.

18/ While the lower court relied on only two decisions, it ignored three which are more closely related to the issue here: Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1975), cert. granted, No. 74-728, Mar. 24, 1975; Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975); Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (1975), vacated and remanded on other grounds, 414 U.S. 970 (1973). For the reasons stated in this brief, we believe that Franks was wrongly decided.

CONCLUSION

For the reasons stated, the complaint states both a §1983 and a Title VII cause of action. Accordingly, the lower court's dismissal of this action should be reversed.

Respectfully submitted,

ABNER W. SIBAL
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

BEATRICE ROSENBERG
CHARLES L. REISCHEL

LUTZ ALEXANDER PRAGER
Attorneys

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 E Street, N. W.
Washington, D. C. 20506

(202) 634-6150

September, 1975

CERTIFICATE OF SERVICE

I certify that copies of the foregoing motion and accompanying brief were today mailed, postage prepaid, to the following counsel of record:

Murray A. Gordon, Esq.
666 Third Avenue
New York, New York 10017

W. Bernard Richland, Corporation Counsel
Municipal Building
New York, New York 10007

LUTZ ALEXANDER PRAGER

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 E Street, N.W.
Washington, D. C. 20506

September 26, 1975